

United Nations  
Nations UniesInternational Criminal Tribunal  
for the former Yugoslavia  
Tribunal Pénal International  
pour l'ex-Yougoslavie

“VUKOVAR HOSPITAL” (IT-95-13/1)

**MRKŠIĆ et al.***The Prosecutor v. Mile Mrkšić, Miroslav Radić & Veselin Šljivančanin***MILE MRKŠIĆ***Convicted of murder, torture and cruel treatment*

Colonel in the Yugoslav People's Army (JNA) and commander of the 1st Guards Motorised Brigade and Operational Group South; after the fall of Vukovar, promoted to the rank of general in the JNA and became the commander of the 8th JNA Operational Group in the Kordun area in Croatia

- Sentenced to **20 years' imprisonment**

*Crimes convicted of (examples):***Murder; torture; cruel treatment** (violations of the laws or customs of war)

- Mile Mrkšić decided to withdraw the JNA officers and soldiers who were guarding the prisoners of war at Ovčara on 20 November 1991. By this act, he rendered substantial practical assistance to the Territorial Defence (TO) and paramilitary forces at Ovčara who were then able to commit the murders. Further, Mile Mrkšić failed that afternoon to prevent the continuance of offences of cruel treatment and torture occurring at the site, of which he was informed.

<b>Born</b>	20 July 1947 in Kozarac, near Vrginmost, Croatia
<b>Indictment</b>	Initial: 7 November 1995; amended: 3 April 1996; amended: 2 December 1997; second amended: 1 November 2002; third amended consolidated indictment: 9 March 2005
<b>Surrendered</b>	15 May 2002
<b>Transferred to ICTY</b>	15 May 2002
<b>Initial appearance</b>	16 May 2002, pleaded not guilty to all charges
<b>Trial Chamber Judgement</b>	27 September 2007, sentenced to 20 years' imprisonment
<b>Appeals Chamber Judgement</b>	5 May 2009, sentenced to 20 years' imprisonment

**MIROSLAV RADIĆ***Found not guilty*

Captain in the JNA; commanded an infantry company in the 1<sup>st</sup> Battalion of the 1<sup>st</sup> Guards Motorised Brigade

- Found not guilty

<b>Born</b>	10 September 1962 in Zemun, Serbia
<b>Indictment</b>	Initial: 7 November 1995; amended: 3 April 1996; amended: 2 December 1997; third amended consolidated indictment: 9 March 2005
<b>Surrendered</b>	21 April 2003
<b>Transferred to ICTY</b>	17 May 2003
<b>Initial and further appearances</b>	21 May 2003, pleaded not guilty to all charges; 16 February 2004, pleaded not guilty to additional charges
<b>Trial Chamber Judgement</b>	27 September 2007, found not guilty

**VESELIN ŠLJIVANČANIN***Convicted of torture*

Major in the JNA; security officer of the 1<sup>st</sup> Guards Motorised Brigade and Operational Group South in charge of a military police battalion subordinated to the 1<sup>st</sup> Guards Motorised Brigade; after the fall of Vukovar, promoted to the rank of lieutenant colonel and placed in command of the Yugoslav Army (VJ) brigade in Podgorica, Montenegro

- Sentenced to **17 years' imprisonment**

*Crimes convicted of (examples):***Murder, Torture**(violations of the laws or customs of war)

- He was found guilty of aiding and abetting murder of 194 individuals at Ovčara. His failure to act pursuant to his duty under the laws and customs of war substantially contributed to the murder of the prisoners of war;
- Veselin Šljivančanin, despite being responsible for the security of the prisoners of war and having visited Ovčara at a time when they were being mistreated, did nothing to stop the beatings or to prevent their continuation. He failed to give appropriate directions to military police guarding the prisoners and he failed to secure, or even to seek, their reinforcement.

<b>Born</b>	13 June 1953 in the municipality of Žabljak, Montenegro
<b>Indictment</b>	Initial: 7 November 1995; amended: 3 April 1996; amended: 2 December 1997; third amended consolidated indictment: 9 March 2005
<b>Arrested</b>	13 June 2003, by Serbian authorities
<b>Transferred to ICTY</b>	1 July 2003
<b>Initial and further appearances</b>	3 July 2003, did not enter a plea; 10 July 2003, pleaded not guilty to all charges; 16 February 2004, pleaded not guilty to additional charges
<b>Trial Chamber Judgement</b>	27 September 2007, sentenced to five years' imprisonment
<b>Appeals Chamber Judgement</b>	5 May 2009, sentenced to 17 years' imprisonment

## STATISTICS

Trial days	189
Witnesses called by Prosecution	52
Prosecution exhibits	597
Witnesses called by Defence	36
Defence exhibits	250

TRIAL	
Commenced	11 October 2005
Closing arguments	14 - 16 March 2007
Trial Chamber II	Judge Kevin Parker (presiding), Judge Christine Van Den Wyngaert, Judge Krister Thelin
Counsel for the Prosecution	Marks Moore, Philip Weiner, Meritxell Regue, Alexis Demirdjian
Counsel for the Defence	For Mile Mrkšić: Miroslav Vasić, Vladimir Domazet For Miroslav Radić: Borivoje Borović, Mira Tapušković For Veselin Šljivančanin: Novak Lukić, Stéphane Bourgon
Judgement	27 September 2007

APPEALS	
Appeals Chamber	Judge Theodor Meron (presiding), Judge Mehmet Güney, Judge Fausto Pocar, Judge Liu Daqun and Judge Andréia Vaz
Counsel for the Prosecution	Paul Rogers
Counsel for the Defence	For Mile Mrkšić: Miroslav Vasić, Vladimir Domazet For Veselin Šljivančanin: Novak Lukić, Stéphane Bourgon
Judgement	5 May 2009

RELATED CASES <i>by geographical area</i>	
DOKMANOVIĆ (IT-95-13a) "VUKOVAR HOSPITAL"	

## INDICTMENT AND CHARGES

The initial indictment against Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin was confirmed on 7 November 1995. On 3 April 1996 the indictment was amended to include the fourth accused, Slavko Dokmanović. The indictment against the four accused was further amended on 2 December 1997.

On 27 June 1997 Slavko Dokmanović was transferred to The Hague and on 4 July 1997 pleaded not guilty to all the charges. On 15 July 1998 proceedings against him were terminated following his death in custody on 29 June 1998 (see Dokmanović, IT-95-13a).

Following the transfer of Mile Mrkšić on 15 May 2002, the Prosecution was given leave to file a further amended indictment against him alone. This indictment, referred to as the second amended indictment, was confirmed on 1 November 2002.

On 21 July 2003, the Prosecution filed the consolidated amended indictment. This indictment included Miroslav Radić and Veselin Šljivančanin, who had recently been transferred to the ICTY. The Trial Chamber did not confirm this indictment, and on 23 January 2004 they ordered the Prosecution to modify the consolidated amended indictment. The new indictment was filed on 9 February 2004.

The allegations against the three accused were further specified in the second modified consolidated amended indictment filed 26 August 2004.

Finally, following the decision of the Trial Chamber of 29 October 2004 the Prosecution filed the third amended consolidated indictment on 15 November 2004. On 9 March 2005 the Trial Chamber ordered that this be the operative indictment in the case.

This indictment alleges that, in late August 1991, the Yugoslav People's Army (JNA) laid siege to the city of Vukovar. The siege continued until 18 November 1991 when the city fell to Serb forces. During the course of the three-month siege, the city was largely destroyed by JNA shelling and hundreds of persons were killed. After Serb forces occupied the city, hundreds more non-Serbs were killed by Serb forces. The overwhelming majority of the remaining non-Serb population of the city was expelled within days of the fall of Vukovar. In the last days of the siege, several hundred people sought refuge at the Vukovar Hospital in the hope that it would be evacuated in the presence of international observers.

According to the indictment, Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin participated in a joint criminal enterprise (JCE). The purpose of the JCE was the persecution of Croats or other non-Serbs who were present at Vukovar Hospital after the fall of the city, through the commission of murder, torture, cruel treatment, extermination and inhumane acts.

It is further alleged that on 20 November 1991, JNA soldiers removed about 400 non-Serbs from the Vukovar Hospital. Miroslav Radić and Veselin Šljivančanin personally participated in the selection of detainees who were to be loaded on buses. The buses left the hospital and proceeded to the JNA barracks where Serb forces comprised of the Territorial Defence ("TO"), volunteer and paramilitary soldiers humiliated and threatened detainees. Some detainees were removed from the buses and beaten in the presence of members of the JNA. The detainees were then transported to a farm building in Ovčara, located about 4 kilometers south of Vukovar, where soldiers beat them. Soldiers then transported their non-Serb captives in groups of about 10 to 20 to a ravine in the direction of Grabovo, a village about 3 km south-east of Ovčara, where they killed at least 264 Croats and other non-Serbs from Vukovar Hospital. After the killings, the bodies of the victims were buried by bulldozer in a mass grave at the same location.

Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin are charged on the basis of individual criminal responsibility (Article 7(1)) and superior criminal responsibility (Article 7(3) of the Statute) with:

- **Persecutions on political, racial, and religious grounds; extermination; murder; torture; inhumane acts** (crimes against humanity, Article 5), and
- **Murder, torture, cruel treatment** (violations of the laws or customs of war, Article 4).

## PRE-TRIAL PROCEEDINGS

The accused Mile Mrkšić was granted temporary provisional release from 31 January 2004 until 2 February 2004, to attend his mother's funeral.

### Rule 61 PROCEEDINGS:

In certain instances, where the Tribunal has been unable to obtain custody of an accused, it has proceeded under Rule 61 of its Rules of Procedure and Evidence. In such proceedings a full Trial Chamber examines an indictment and the supporting evidence in public and, if it determines that there are reasonable grounds for believing that the accused committed any or all of the crimes charged, confirms the indictment and issues an international arrest warrant. The latter is intended to ensure that the accused will be arrested if he crosses international borders. In addition, the Chamber may certify, upon proof by the Prosecutor, that the failure to service the arrest warrant on the accused was due to the failure to execute an arrest warrant or refusal of a State to co-operate with the Tribunal. The President of the Tribunal, in consultation with the presiding Judges of the Trial Chambers, may then notify the Security Council of such failure or refusal by a State. A Rule 61 hearing is not a trial *in absentia* and does not provide for a finding of guilt.

Rule 61 hearings in the Mrkšić *et al.* case were held from 20 to 28 March 1996, with Judge Jorda presiding. In addition to written evidence, the Prosecutor presented live testimony from 11 witnesses. On 3 April 1996, the Trial Chamber issued a decision confirming the initial indictment and issuing international arrest warrants for Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin which were sent to all States and to the NATO-led Implementation Force (IFOR) that was in Bosnia and Herzegovina at the time.

The Trial Chamber also considered that the failure to arrest Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin could be ascribed to the refusal of the Federal Republic of Yugoslavia (Serbia and Montenegro) to cooperate with the ICTY. Accordingly, the Trial Chamber requested the Tribunal's President to report this failure to comply with their legal obligations to the UN Security Council and on 24 April 1996 President Antonio Cassese sent a letter to this effect. Following receipt of this letter the Security Council issued a number of resolutions urging compliance with the Tribunal.

## TRIAL

The Trial against Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin commenced on 11 October 2005. The Prosecution case in chief concluded on 23 June 2006. The defence case commenced on 30 August 2006 and lasted until 8 December 2006. The closing arguments of the Prosecution were presented on 14 and 15 March and the closing arguments of the Defence on 15 and 16 March 2007.

### RULE 98*bis* DECISION

After the conclusion of the presentation of Prosecution evidence, the Trial Chamber can rule on whether there is a case to answer. If the Chamber believes that the Prosecution has not presented sufficient evidence to prove certain charge(s), it can dismiss those charges and enter a judgement of acquittal before the beginning of the presentation of Defence evidence.

On 28 June 2006, the Trial Chamber in the *Mrkšić et al.* case issued an oral decision pursuant to Rule 98*bis* in which it stated the following: "... the Chamber is therefore of the view that there is no basis on which it can enter judgement of acquittal on any count which is set out in the indictment against any one of the three accused at the present time in its consideration of the requirements of Rule 98*bis* ..."

## TRIAL CHAMBER JUDGEMENT

The Trial Chamber rendered its judgement on 27 September 2007. The main allegation in the indictment was that the accused were involved in a joint criminal enterprise, with a common purpose of the commission of the crimes alleged in the Indictment. In essence, the allegation was that Mile Mrkšić,

Miroslav Radić and Veselin Šljivančanin acted together to achieve the murder and mistreatment of the prisoners of war from the Vukovar hospital. The Trial Chamber, however, found that there was no direct evidence which established this joint criminal enterprise.

While many of the facts were strenuously contested, the Chamber found that the evidence established that prisoners of war were taken from the Vukovar hospital on the morning of 20 November 1991 and eventually to Ovčara on the orders of Mile Mrkšić given on 19 November 1991, and implemented by the accused Veselin Šljivančanin. The Chamber was satisfied, however, that the original intention of Mile Mrkšić was for the prisoners of war to be taken to Sremska Mitrovica, among other things, with a view to their being later exchanged for Serb prisoners of war held by the Croatian authorities. This was the order given to Veselin Šljivančanin and communicated to many others involved in the evacuation. It was what had been done with other prisoners of war in the preceding days.

During the morning of 20 November 1991, Mile Mrkšić changed his mind and then his orders. First, the prisoners were held in buses at the JNA barracks, and then at the hangar at Ovčara, but in each case they were still guarded, albeit less than effectively, by JNA military police. Eventually, late in the day, Mile Mrkšić decided, and ordered, that the JNA military police guarding the prisoners be withdrawn. The effect of the evidence was that it was at the time of this order that Mile Mrkšić finally decided that the prisoners of war should be left in the custody of the Vukovar Territorial Defence. The full reasons for his conduct were known only to Mile Mrkšić. The wishes of the local Serb government, which had no lawful authority or power to direct Mile Mrkšić or the JNA as to what should be done with the prisoners of war, appeared to have been a significant factor.

The evidence did not indicate that at any time either Veselin Šljivančanin or Miroslav Radić had any involvement in the process by which Mile Mrkšić reached his decision that the JNA should relinquish its custody of the prisoners of war by withdrawing the JNA military police who were guarding them. These factual circumstances precluded any conclusion that Mile Mrkšić, Veselin Šljivančanin and Miroslav Radić were acting together in a joint criminal enterprise.

The indictment also alleged that Mile Mrkšić was, among other forms of liability, responsible for having ordered the commission of the crimes with which he was charged. However, the Chamber concluded that there was a complete absence of evidence to support such a conclusion. Even though, as the commander of Operational Group South, Mile Mrkšić was in the position of authority in respect of the Territorial Defence and paramilitary forces who perpetrated the crimes of cruel treatment, torture and murder, at Ovčara, it was not established that he had ordered them to commit the crimes charged.

The Trial Chamber did find that Mile Mrkšić knew of intense feelings of animosity harboured by the Serb Territorial Defence and paramilitary forces against members of the Croat forces. In particular, this had been demonstrated in the course of that day by the conduct at the JNA barracks and at Ovčara, which had been reported to Mile Mrkšić by a number of JNA officers. He had also been informed of killings at Velepromet the preceding day. By ordering the JNA military police to withdraw from Ovčara, when he knew of the high risk to the prisoners of war of serious violence and death at the hands of Territorial Defence and paramilitary forces, Mile Mrkšić aided and abetted the offences of murder that were committed as a consequence of his order for withdrawal. For these reasons, the Chamber found that Mile Mrkšić was responsible under Article 7(1) of the Statute for having aided and abetted the offence of murder.

Further, Mile Mrkšić took no steps during the afternoon of 20 November 1991 to reinforce the guards at Ovčara, or to improve in any way the measures for securing the prisoners of war from violence and other cruel treatment at the hands of the Territorial Defence and paramilitary forces, despite having been informed of the severe mistreatment that was occurring. By his failure to act, Mile Mrkšić rendered both practical assistance and encouragement to those at Ovčara who sought revenge on the prisoners of war. He was, therefore, found responsible under Article 7(1) of the Statute for having aided and abetted the crimes of torture and cruel treatment.

Regarding Miroslav Radić, the evidence established that he was at the Vukovar hospital on 19 November 1991, and that JNA soldiers under his command provided the initial security of the hospital. It was further established that Miroslav Radić was present at the compound of the hospital in the morning of 20 November 1991, but not that he participated in the triage in front of the hospital. There was no evidence that Miroslav Radić was at Ovčara on 20 November 1991. For reasons mentioned when discussing the responsibility of Mile Mrkšić, there was no evidence which established that Miroslav Radić participated in a joint criminal enterprise. Two witnesses gave quite different evidence suggesting that Miroslav Radić was informed that soldiers under his command had participated in the mistreatment and killing of prisoners of war at Ovčara. A further witness suggested he was aware of the events at Ovčara. The Chamber was not

able to accept the honesty of two of these witnesses or the reliability of the third witness. Hence, for reasons fully set out in the written judgement, the Chamber found that it had not been established by the Prosecution that Miroslav Radić had knowledge or reason to know that soldiers under his command had committed crimes at Ovčara.

As for the accused Veselin Šljivančanin, the Chamber observed that for reasons expressed when discussing the responsibility of Mile Mrkšić, the evidence did not establish that Veselin Šljivančanin participated in any joint criminal enterprise as alleged in the Indictment.

The indictment alleged that Veselin Šljivančanin was responsible, under Article 7(1) of the Statute, for having ordered the commission of the crimes alleged in the indictment. The Chamber found that there was no evidence to suggest that Veselin Šljivančanin ordered any forces at Ovčara to commit any of the offences charged in the indictment. Further, the crimes in this case were perpetrated by Territorial Defence and paramilitary forces. Veselin Šljivančanin had no power of command over those forces. On the evidence, Veselin Šljivančanin could not be held responsible under Article 7(1) of the Statute for having ordered the commission of any of the crimes established in this case. Nor did the evidence establish his responsibility under Article 7(3) for having failed to prevent the commission of crimes or to punish the perpetrators.

It was the Chamber's finding that on 20 November 1991, Veselin Šljivančanin exercised command authority conferred on him by Mile Mrkšić, over the military police involved in the evacuation of prisoners of war from the hospital and guarding them on the buses and at Ovčara. It was not alleged, nor did the evidence establish, that members of the military police perpetrated any of the crimes in this case. On the contrary, they were involved, albeit often unsatisfactorily in securing the prisoners of war from mistreatment by the Territorial Defence and paramilitary forces. As the facts of this case revealed, the security provided to the prisoners of war at Ovčara was insufficient. The number of military police troops at Ovčara was far too low and their performance was at times unsatisfactory, so that for much of the time the prisoners were exposed to the hostile acts of the Territorial Defence and paramilitary forces who had gathered at Ovčara. Contrary to Veselin Šljivančanin's own and other evidence the Chamber found that he was at Ovčara for a time when mistreatment to the prisoners was occurring. He was thus able to observe the brutal conduct of the Territorial Defence and paramilitary forces and became aware that serious crimes were being committed against the prisoners of war. In addition, he knew of past events of the same nature, in particular of the mistreatment including killings of Croat prisoners of war by local Serb Territorial Defence and paramilitary forces at Velepromet on the preceding day, as well as of other similar incidents that had taken place in the area of Vukovar in the months of October and November 1991. However, he chose not to resort to any of the measures available to him to seek to prevent what was occurring. He failed to discharge the duty of care for the prisoners of war kept in the custody of the JNA, a duty which was imposed on him by the laws of war and which was part of his responsibility as the security organ, and by the specific responsibility placed on him by Mile Mrkšić. Veselin Šljivančanin could have sought or ordered additional troops to Ovčara. He could have given orders to the military police present there to enhance the protection. He failed to give appropriate orders and take other appropriate action. This facilitated the continuing mistreatment of prisoners of war and thus the commission of the crimes of torture and cruel treatment, as it can only have been obvious to him in the circumstances. For these reasons, the responsibility of Veselin Šljivančanin, pursuant to Article 7(1) of the Statute, for having aided and abetted the crimes of torture and cruel treatment had been established.

He was not found responsible, however, for having aided and abetted the crime of cruel treatment committed by the imposition of inhumane conditions of detention in the hangar at Ovčara, as the evidence did not demonstrate that Veselin Šljivančanin entered the hangar and was able to observe the conditions of detention in the hangar.

The crime of murder was committed during the night after the withdrawal of all JNA military police from Ovčara, pursuant to the order of Mile Mrkšić. By that order, Veselin Šljivančanin necessarily ceased to be responsible for the security of the prisoners of war, and his command authority in respect of the military police that had provided security came to an end. He was not responsible, therefore, for the murders committed by Territorial Defence and paramilitary troops after the JNA military police were withdrawn from Ovčara.

On 27 September 2007, the Trial Chamber rendered its judgement convicting the accused as follows:

Mile Mrkšić, on the basis of individual criminal responsibility (Article 7(1) of the Statute of the Tribunal) with:

- Murder (violations of the laws or customs of war, Article 3)
- Torture (violations of the laws or customs of war, Article 3)
- Cruel treatment (violations of the laws or customs of war, Article 3)

Sentence: 20 years' imprisonment

Veselin Šljivančanin, on the basis of individual criminal responsibility (Article 7(1) of the Statute of the Tribunal) with:

- Torture (violations of the laws or customs of war, Article 3)

Sentence: five years' imprisonment

Miroslav Radić was acquitted of all charges.

## APPEALS CHAMBER JUDGEMENT

On 29 October 2007, the Defence of Veselin Šljivančanin and Mile Mrkšić filed their notices of appeal against the judgement. On the same day, the Prosecution filed its notice of appeal against the judgement with respect to Mile Mrkšić and Veselin Šljivančanin.

On 11 December 2007, Veselin Šljivančanin was granted provisional release pending the hearing of his appeal.

On 8 February 2008, the Prosecution filed the public version of its appeal brief. On 28 August 2008, the Defence of Veselin Šljivančanin filed its amended notice of appeal and appeal brief. On 15 September 2008, the Defence of Mile Mrkšić filed a public redacted version of its appeal brief.

On 4 December 2008, the Appeals Chamber ordered Veselin Šljivančanin to return from provisional release only for the duration of the appeals hearing, which took place on 21 and 23 January 2009.

On 9 April 2009, the Appeals Chamber ordered Veselin Šljivančanin to return from provisional release for the appeals judgement.

All eleven counts of appeal filed by Mrkšić and all six filed by Šljivančanin were dismissed by the Appeals Chamber.

The Prosecution brought four grounds of appeal against the Trial Judgement and requested the Appeals Chamber to: reverse the acquittals of Veselin Šljivančanin and Mile Mrkšić under Article 5 of the Statute on crimes against humanity; overturn the acquittal of Veselin Šljivančanin for murder as a violation of the laws and customs of war; revise and increase Veselin Šljivančanin and Mile Mrkšić's sentences in order to properly reflect the gravity of their criminal conduct; and lastly, revise and increase Veselin Šljivančanin and Mile Mrkšić's sentences in case the Appeals Chamber enters new convictions under Article 5 of the Statute.

In its second ground of appeal the Prosecution argued that Trial Chamber erred in fact and in law in failing to find that Mr. Šljivančanin was responsible for aiding and abetting the murder of the 194 people identified in the Schedule to the Trial Judgement as having been killed at Ovčara on the evening of 20/21 November 1991. The Prosecution submitted that the Trial Chamber erred in failing to find that Mr. Šljivančanin knew, at the time of his visit to Ovčara, that the TOs and paramilitaries would likely kill the prisoners. The Appeals Chamber found that it was not unreasonable for the Trial Chamber to have concluded that, as long as the presence of the JNA troops continued, they might have continued to provide a sufficient intervening element to prevent the mistreatment by TOs and paramilitaries from escalating from physical abuse to killing despite their failure to prevent mistreatment altogether. As a result, the Appeals Chamber found that Mr. Šljivančanin did not possess the requisite *mens rea* for aiding and abetting murder as long as he was under the understanding that the JNA troops remained at Ovčara. The Appeals Chamber noted that the Trial Chamber did not make a finding or draw any inference as to when or whether Mr. Šljivančanin became aware of the order to withdraw the JNA troops on the night of 20 November 1991. However, the only reasonable conclusion that could be drawn was that Mr. Mrkšić told Mr. Šljivančanin in the course of their meeting upon Mr. Šljivančanin's return to Negoslavci that night that he had withdrawn the JNA protection from the prisoners of war held at Ovčara. Given the Trial Chamber's

finding that it was Mr. Šljivančanin's knowledge of the presence of the JNA troops that precluded him from concluding that the killing of the prisoners of war was a likely occurrence, the only reasonable inference was that upon learning of the order to withdraw the troops, Mr. Šljivančanin realised that the killing of the prisoners of war at Ovčara had become a likely occurrence. Similarly, knowing that the killing of prisoners of war was the likely outcome of their being left in the custody of the TOs and paramilitaries, Mr. Šljivančanin must have also realised that, given his responsibility for the prisoners of war, if he failed to take action to ensure the continued protection of prisoners of war he would be assisting the TOs and paramilitaries to carry out the murders. As a result, the Appeals Chamber found that upon learning of the order to withdraw the JNA troops from Mr. Mrkšić at their meeting of the night of 20 November 1991, the only reasonable inference was that Mr. Šljivančanin was aware that the TOs and paramilitaries would likely kill the prisoners of war and that if he failed to act, his omission would assist in the murder of the prisoners. Accordingly, the Appeals Chamber found that upon learning of Mr. Mrkšić's order to withdraw the JNA troops from Ovčara, Mr. Šljivančanin informed the *mens rea* for aiding and abetting murder.

Turning to Mr. Šljivančanin's responsibility for the welfare and security of the prisoners of war in the context of Geneva Convention III, the Appeals Chamber therefore considered that Mr. Šljivančanin was under a duty to protect the prisoners of war held at Ovčara and that this responsibility included the obligation not to allow the transfer of custody of the prisoners of a war to anyone without first satisfying himself that they would not be harmed. Mr. Mrkšić's order to withdraw the JNA troops did not relieve him of his position as an officer of the JNA. For the foregoing reasons, the Appeals Chamber found that the Trial Chamber erred in finding that Mr. Šljivančanin's duty to protect the prisoners of war pursuant to the laws and customs of war came to an end upon Mr. Mrkšić's order to withdraw. The Appeals Chamber must be satisfied beyond reasonable doubt that the Prosecution had demonstrated that Mr. Šljivančanin substantially contributed to the killings by his inaction and that, when account was taken of the errors committed by the Trial Chamber, all reasonable doubt concerning Mr. Šljivančanin's guilt had been eliminated. In this regard, the Appeals Chamber recalled that aiding and abetting by omission implicitly required that the accused had the ability to act but failed to do so. The Appeals Chamber considered that even though Mr. Šljivančanin no longer had *de jure* authority over the military police deployed at Ovčara, he could have informed the military police deployed at Ovčara that Mr. Mrkšić's order was in breach of the overriding obligation under the laws and customs of war to protect the prisoners of war, and thus constituted an illegal order. Issuing an order contrary to Mr. Mrkšić's to the military police of the 80<sup>th</sup> Motorised Brigade was a course of action that would have required Mr. Šljivančanin to go beyond the scope of his *de jure* authority, which had been effectively removed by virtue of Mr. Mrkšić's withdrawal order. The Appeals Chamber considered that in certain circumstances an officer may be required, within the limits of his capacity to act, to go beyond his *de jure* authority to counteract an illegal order. The Appeals Chamber further considered that Mr. Šljivančanin could have attempted to persuade Mr. Mrkšić to abort the withdrawal order. Had his attempts to persuade Mr. Mrkšić not been successful, when Mr. Šljivančanin telephoned Belgrade in order to speak to General Vasiljević, he could have sought the General's assistance on the matter. The Appeals Chamber considered that had Mr. Šljivančanin been successful in securing the return of the military police to Ovčara, the murder of the prisoners of war would have been substantially less likely. The Appeals Chamber thus found that Mr. Šljivančanin's failure to act pursuant to his duty under the laws and customs of war substantially contributed to the murder of the prisoners of war. For the foregoing reasons, the Appeals Chamber found, Judge Pocar and Judge Vaz dissenting, that all the requirements for a conviction for aiding and abetting murder by omission have been met, and was satisfied beyond reasonable doubt that the Prosecution had shown that, when account was taken of the errors committed by the Trial Chamber, all reasonable doubt concerning Mr. Šljivančanin's guilt had been eliminated.

In light of the foregoing, the Appeals Chamber found that there was a discernible error in the Trial Chamber's exercise of discretion in imposing the sentence. Even though the Trial Chamber did not err in its factual findings, considering the findings of the Trial Chamber on the gravity of the crimes, and in particular the consequences of the torture upon the victims and their families, the particular vulnerability of the prisoners, and the very large number of victims, the Appeals Chamber found that the sentence of five years' imprisonment was so unreasonable that it could be inferred that the Trial Chamber must have failed to exercise its discretion properly. The Appeals Chamber thus found that a five years' imprisonment sentence did not adequately reflect the level of gravity of the crimes committed by Mr. Šljivančanin.

On 5 May 2009, the Appeals Chamber rendered its judgement and increased the sentence of five years' to 17 years' imprisonment for Veselin Šljivančanin. With regard to Mile Mrkšić, the Chamber dismissed the accused's eleven grounds of appeal and dismissed the Prosecution's two grounds of appeal. The Chamber

reaffirmed the guilt of Mile Mrkšić of having aided and abetted the murder and torture of prisoners, as well as the inhumane conditions of detention at Ovčara between 20 and 21 November 1991, and upheld the 20 years' sentence imposed by the Trial Chamber.